

1984

## Hearings on Jury Bias or Misconduct

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### Recommended Citation

Ronald J. Bacigal, *Hearings on Jury Bias or Misconduct*, 10 Va. B. Ass'n J. 20 (1984).

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# Hearings on Jury Bias or Misconduct

THE general rule in Virginia and in the federal system has always been that “the deliberations of the jury and the motives which actuate them in arriving at a verdict are secret and usually even jurors themselves will not be allowed to impeach their verdict” during the polling process or by subsequent affidavit.<sup>1</sup> The major exception to this general rule involves situations where outside influence upon the jury has affected the defendant’s constitutional right to an impartial jury. In the recent cases of *Smith v. Phillips*,<sup>2</sup> and *Rushen v. Spain*,<sup>3</sup> the United States Supreme Court recognized that judicial review of *ex parte* contacts with a sitting jury may raise a number of separate but interrelated constitutional rights: (1) the right to an impartial jury; (2) the right to a due process post-trial hearing on jury bias; (3) a possible due process right to a mid-trial hearing on jury bias; (4) the defendant’s right to be present at such mid-trial hearings; and (5) the right to be represented at such mid-trial hearings.

As Justice Stevens noted in his concurring opinion in *Rushen*, confusion abounds in identifying these rights and applying them in a factual context. This article suggests that the various rights and procedures can best be understood by distinguishing between post-trial and mid-trial inquiries into jury bias.

## Post-Trial Hearings

In *Remmer v. United States*,<sup>4</sup> there was a purported attempt to influence a juror and a follow-up FBI investigation which included an interview of the juror. Because the trial judge did not learn of the situation until after trial, there was no opportunity for any mid-trial corrective action. The United States Supreme Court, however, ordered a post-trial hearing into the impartiality of the juror, and recognized a presumption of prejudice which the prosecution must overcome at the hearing. Because proof of jury bias is often difficult to obtain in a post-trial hearing,<sup>5</sup> placing the burden of proof upon the prosecution often determines the substantive issue.<sup>6</sup>

Although *Remmer* has not been overruled, the burden of proof may have been shifted to the defense in the more recent case of *Smith v. Phillips*.<sup>7</sup> In

*Smith*, as in *Remmer*, the trial judge learned after the verdict that there might have been juror misconduct. (During the trial a juror had submitted an application for employment as an investigator in the District Attorney’s Office.) Because there was no opportunity for mid-trial corrective action, the defendant was entitled to a *Remmer* type post-trial hearing. Surprisingly, the *Smith* opinion cited *Remmer* but did not mention *Remmer*’s presumption of prejudice. The Supreme Court held that due process merely requires that the defendant have an “opportunity to prove actual bias.”

It may be that *Smith* has overturned the *Remmer* presumption, however, *Smith* and *Remmer* can both be read as valid law if each is limited to a distinct situation. *Remmer* involved third party contact with a juror, and the presumption of prejudice may apply only when third party contact exists. *Smith*, however, did not involve any third party contact but only the juror’s own possible misconduct which raised the issue of potential bias. When no third party contact exists, the *Remmer* presumption of prejudice may be inapplicable and the burden to prove actual prejudice may shift to the defendant. A Fourth Circuit case questioning the relationship between *Remmer* and *Smith* is before the Supreme Court on a petition for certiorari,<sup>8</sup> but it may be some time before the Court provides any guidance as to the continuing validity of the *Remmer* presumption.

## Mid-Trial Inquiries Into Jury Bias

In situations such as *Remmer* and *Smith* there was no opportunity for mid-trial inquiries into jury bias, thus the defendant was limited to a post-trial hearing on possible juror misconduct. A different situation arises, however, when the trial court learns of possible misconduct or outside influence before the conclusion of the trial. In *Rushen v. Spain*,<sup>9</sup> a juror went to the trial judge’s chambers to disclose her personal knowledge of facts relevant to the case. The judge questioned the juror about her ability to be impartial, but the judge made no record of the conversation and did not inform the defendants or their counsel about the in-chambers conversations. After trial, defense counsel learned of the *ex parte* commun-

ications between judge and juror and moved for a new trial. The Court of Appeals for the Ninth Circuit affirming the granting of a new trial on the grounds that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error.

*Rushen* thus raised issues quite distinct from *Remmer* and *Smith*. *Remmer* and *Smith* addressed only the due process right to a post-trial hearing on jury impartiality, while *Rushen* raised questions of the right of the defendant and defense counsel to be present during mid-trial communications between judge and juror regarding jury bias. Unfortunately, the Supreme Court did not resolve these issues because the government conceded error and maintained that such errors were harmless. The *Rushen* majority held only that if it was error to exclude the defendant and counsel from the in-chambers communications, such error could be found harmless at a post-trial hearing. It must be recognized that the burden of proof at such a hearing is quite distinct from the burden at a *Smith*-type hearing. Under *Smith*, the defense must establish a violation of the right to an impartial jury. Under *Rushen*, the prosecution must establish that violations of the right to be present and represented by counsel are harmless beyond a reasonable doubt.

*Rushen* is a very limited case because it addressed application of the harmless error doctrine without deciding whether error existed. Based on dicta in the case, however, the Supreme Court seems prepared to recognize the right to personal presence and the right to counsel at all substantive<sup>10</sup> communications between judge and jury. Although the court noted that the constitutional dimension of such rights was not in issue in the case, the Court referred to such rights as "fundamental rights." Having gone this far in dicta it would be difficult for the Court to subsequently hold that such rights are not of a constitutional dimension. In fact, it may be difficult for the Court to stop short of the approach taken by the Second Circuit Court of Appeals which identified four necessary components for the proper disposition of any communication between judge and jury. (1) The jury's inquiry should be submitted in writing. (2) It should be marked as a court exhibit and read into the record in the presence of counsel and the defendant. (3) Counsel should be afforded an opportunity to suggest appropriate responses. (4) Messages from a jury should be answered in open court.<sup>11</sup>

### Summary

Pending further clarification from the Supreme Court, confusion will continue as to the nature of the



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various hearings on jury bias or misconduct. It is possible, however, to outline some general guidance for counsel. (1) In situations where allegations of jury bias or misconduct first come to light after the verdict, the defense is entitled to a due process hearing on jury impartiality. At such hearings, it is unclear whether the prosecution must overcome a presumption of prejudice (*Remmer v. United States*) or whether the defense must prove actual bias (*Smith v. Phillips*). (2) In cases where such allegations arise prior to verdict, it is unclear whether the defense has a right to a mid-trial hearing on jury bias.<sup>12</sup> (3) If the trial judge does conduct a mid-trial hearing, there is strong dicta, but no actual Supreme Court holding, that the defendant and counsel have a right to participate in the hearing (*Rushen v. Spain*). (4) Denial of the right to be present

and to participate in a mid-trial hearing can later be found to be harmless error in a post-trial hearing where the government must prove harmlessness beyond a reasonable doubt. (*Rushen v. Spain*).

FOOTNOTES

1. *Clark v. Commonwealth*, 135 Va. 490, 115 S.E. 704 (1923). Fed. R. Evid. 606(b).
2. 102 S. Ct. 940 (1982).
3. 104 S. Ct. 453 (1983).
4. 347 U.S. 227 (1954).
5. See Justice Marshall's dissenting opinion in *Smith v. Phillips*, 102 S. Ct. 940, 952 (1982).
6. The prosecution in *Remmer* was unable to overcome the

presumption of prejudice at the post-trial hearing. *Remmer v. United States*, 350 U.S. 377 (1956).

7. 102 S. Ct. 940 (1982).
8. Professor Bacigal is Of Counsel in *Reed v. United States*, 717 F.2d 1481 (4th Cir. 1983), petition for certari filed 1/11/84.
9. 104 S. Ct. 453 (1983).
10. "There is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Rushen v. Spain*, 104 S. Ct. 453, 456 (1983). It is unlikely that the Court would recognize the right to counsel at chance encounters between judge and juror where the conversation relates to the weather or directions to the bathroom.
11. *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981).
12. See, *Rushen v. Spain*, 104 S. Ct. 453, 460 (1983), Justice Stevens concurring.

## Mortgage Financing

(continued from page 9)

ties, the amount of consideration being paid for the option, the undivided interest in the borrower's property subject to the option, whether or not the option is exercisable in event of default, and, in particular, whether there is present in the transaction some device by which the borrower may unwind or buy back the lender's option.<sup>4</sup>

FOOTNOTES

1. Any covenant, otherwise authorized by law, that the lender shall be entitled to share in the gross income or the net income, or the gross rent or revenues, or net rents or revenues of the property, or in any portion of the proceeds or appreciation upon sale or appraisal or similar event, shall be on an equal priority with the principal debt secured by the deed of trust, in the event of sale to be paid next after the expenses of executing the trust, and shall be specified in the recorded deed of trust or other recorded document in order to be notice of record as against subsequent parties. (Virginia Code 55-59 (5a).)

2. *Modern Mortgage Law and Practice*, Second Edition, by Robert Kratovil, J.D. and Raymond Werner, J.D., published by Prentice Hall, Inc., Englewood Cliffs, N.J. 1981.

3. *Bar v. Granahan*, 38 N.W. 2d 705 (Wis. Sup. Ct. (1949)). *Coursey v. Fairchild*, 436 P.2d 35 (Okla. 1967). *Hopping v. Baldridge*, 130 Okla. 226, 266 P.2d 469 (1928). *Kreglinger v. New Patagonia Meat & Cold Storage Company, Ltd.* (1914 H.L.) A.C. 25, 109 L.T.R. (n.s.) 802. *MacArthur v. North Palm Beach Utilities, Inc.*, 202 So.2d 181 (Fla. 1967). *Multiservice Bookbinding Ltd. and Others v. Marden*, 2 All ER 489 (1978). *Smith v. Smith*, 82 N.H. 399, 135 A.2d 25 (1926).

4. New York has been one of the first states to propose legislation dealing with the convertible mortgage. A bill was introduced in the New York State Legislature in 1983 which would provide that an option to acquire an interest in property shall not be unenforceable because the owner of such interest grants such option to the holder of a mortgage which is a lien on such property simultaneously with any loan secured by such mortgage if (1) the power to exercise such option is not dependent upon an occurrence of default with respect to such loan, and (2) such loan is in the amount of \$2,500,000 or more when the option is granted. The bill did not pass the New York Senate and Assembly in 1983 but is being reintroduced in 1984. (1983 S. 4797-A; A.6372-A)

## Registration of Charitable Organizations

(continued from page 19)

- 100-E Request for Exemption for Out-of-State Media Solicitations
- 100-F Request for Exemption for Solicitations Confined to Five Contiguous Counties or Cities
- 100-G Request for Exemption—Civic Organization
- 100-H Request for Exemption—Health Care Institutions

- 100-X Consolidated Exemption Supplemental Form
- 101 Request for Exemption by Organizations for Reciprocal Agreement with Other States
- 102 Virginia Initial and Annual Registration Statement

FOOTNOTES

1. § 57-48 (2), Code of Virginia (1950).
2. *Ibid.*
3. § 57-48 (3A), Code of Virginia (1950).
4. § 57-49 (A), Code of Virginia (1950).



<b>The Winter Meeting .....</b>	<b>26</b>
<b>Announcements</b>	
<b>Future Association Meeting Dates ....</b>	<b>28</b>
<b>Award Presented .....</b>	<b>28</b>
<b>Fourth Circuit Court Notice .....</b>	<b>28</b>
<b>YLS Chairman's Report .....</b>	<b>29</b>
<b>Committee Reports .....</b>	<b>33</b>
<b>New Members of the Association .....</b>	<b>41</b>
<b>Membership Application .....</b>	<b>43</b>
<b>Memorials .....</b>	<b>45</b>



